O.S.K. & PARTNERS SDN. v. TENGKU NOONE AZIZ & ANOR.

[F.C. (Raja Azlan Shah L.P., Abdul Razak & Abdoolcader JJ.) November 2 & 3; December 21, 1982] [Kuala Lumpur – Federal Court Civil Appeal No. 10 of 1982]

Administrative Law – Certiorari – Decision of Committee of Kuala Lumpur Stock Exchange – Whether certiorari lies – Committee body of persons having legal authority to determine the rights of persons licensed to carry on business as stockbrokers – Rules of Kuala Lumpur Stock Exchange – Articles of the Kuala Lumpur Stock Exchange, Article 27 – Securities Industry Act, 1973.

In this case the appellant, a stockbroker carrying on business as a member of the Kuala Lumpur Stock Exchange, applied for an order of certiorari to quash the decision of the Committee of the Stock Exchange imposing a fine of $5,000 on the appellant under Article 27 of the Articles of Association of the Stock Exchange for alleged breaches of the rules of the Exchange consequent to the rejection by the Registrar of Companies as the licensing authority under the Securities Industry Act, 1973 of the application for a dealer's licence by one of the shareholders and directors of the appellant.

The appellant alleged that the Committee did not indicate to it that it had breached the rules in question or give it an opportunity to be heard; and that the Committee had erred in law in its construction of the effect and application of the rules.

Hashim Yeop A. Sani J. held that the Committee was not a body against whom certiorari will lie on the grounds that (a) the Exchange (and therefore its Committee) is essentially a private body; (b) the relationship between the parties is strictly contractual in nature; (c) the Committee is not under any express or implied duty to act judicially when exercising disciplinary powers and (d) the functions of the Exchange are not in any way manifestly public in nature as it is no more than an exclusive business club. The appellants appealed.

Held: (1) that prerogative orders may be applicable to decisions of bodies owing their powers solely to contract provided their powers although contractual are infused with a public element and also a body legislatively recognised may be subject to such jurisdiction;.

(2) the Stock Exchange is a hybrid corporation – a company incorporated under the Companies Act but recognised and regulated by the Securities Industry Act, 1963, and subject to its governance and authority with therefore an element of public flavour superimposed on the contractual element in relation to its members;

(3) the exercise of disciplinary powers by the Stock Exchange is conferred and prescribed by legislation under which the Minister is to approve the scope and type of such powers and the exercise whereof would affect the livelihood of its members;

(4) the Committee which is responsible for the management of the affairs of the Exchange is a body of persons having legal authority to determine the rights of persons licensed under the Securities Industry Act, 1963, to carry on business as stockbrokers and it follows that in purporting to exercise its disciplinary functions it necessarily has the duty to act judicially in the exercise of that power and it is therefore subject to judicial review by way of certiorari and prohibition;

(5) the matter should be remitted to the High Court for continued hearing of the substantive motion for certiorari on its merits.

Cases referred to:

(1) *In re Application by Loke Wan Tho* [1956] M.L.J. 149.
(2) *Nakkudi Ali* v. *Jayarantne* [1951] A.C. 66, 75.
(3) *R.* v. *Board of Visitors of Hull Prison, Ex parte St. Germain & Ors.* [1978] Q.B.D. 678, 688.
(4) *R.* v. *Electricity Commissioners, Ex parte London Electricity Joint Committee* (1920) Ltd. [1924] 1 K.B. 171, 130.
(5) *Ridge* v. *Baldwin* [1964] A.C. 40, 74-79, 130.
(6) *R.* v. *Metropolitan Police Commissioner, Ex parte Parker* [1953] 2 All E.R. 717.
(7) *R.* v. *Barnsley Metropolitan Borough Council, ex parte Hook,* [1976] 1 W.L.R. 1052, 1060.
(8) *R.* v. *Hull Visitors, Ex parte St. Germain* [1979] 2 W.L.R. 42.
(9) *R.* v. *Criminal Injuries Compensation Board* [1967] 2 All E.R. 770.
(10) *Ridge* v. *Baldwin* [1964] A.C. 40, 74-79, 130.
(11) *R.* v. *Manchester Legal Aid Committee, ex parte R. A. Brand & Co. Ltd* [1952] 2 Q.B. 413, 428-429.
(12) *R.* v. *Criminal Injuries Compensation Board, Ex parte Lain* [1967] 2 Q.B. 864, 882.
(13) *Reg.* v. *Board of Visitors of Hull Prison, Ex parte St. Germain & Others* [1979] 1 Q.B. 425, 448, 455-458, 463-466.
(14) *Reg. (Doris)* v. *Ministry of Health & Local Government and the Northern Ireland Health Services Board* [1954] N.I. 79.
(15) *Reg.* v. *Wadley, Ex parte Burton* [1976] Qd. R. 28, 295.

HIGH COURT.

Raja Abdul Aziz Addruse for the applicant.
Wong Chong Wah for the respondent.

Cur. Adv. Vult.

Hashim Yeop A. Sani J.: In this notice of motion the applicant, an unlimited company incorporated under the Companies Act 1965 and a member of the Kuala Lumpur Stock Exchange is seeking to quash the decision of the Kuala Lumpur Stock Exchange Committee made on April 21, 1979 imposing on the applicant a fine of $15,000/- for alleged breaches of certain rules of the Rules of the Kuala Lumpur Stock Exchange. The grounds for the application are that the said decision was made in excess of jurisdiction, contrary to natural justice and that the Stock Exchange Committee was wrong in law in the

application of the said rules.

At the commencement of the hearing both parties agreed that a preliminary question should be determined first and the question is whether the Kuala Lumpur Stock Exchange is a body to which an order of certiorari will lie.

The Kuala Lumpur Stock Exchange is a company registered under the Companies Act 1965 and regulated by the Securities Industry Act 1973. It is a company limited by guarantee. Although there would seem to be no dispute at all that the Kuala Lumpur Stock Exchange was in existence even before the coming into force of the Securities Industry Act 1973 as a company registered under the Companies Act 1965, a number of controls were introduced by the Securities Industry Act 1973 affecting the Stock Exchange. For example under section 5 of the Act no person shall establish, maintain or assist in the establishment of a stock market which is not a stock market of a Stock Exchange. Section 6 of the Act provides for the establishment of a Stock Exchange to be approved by the Minister responsible. The Minister may in writing approve a body corporate as a Stock Exchange if he is satisfied that at least 10 members of the body will carry on the business dealing in securities and that the rules of the Stock Exchange make satisfactory provisions relating to a number of matters including expulsion, suspension and discipline of members of the Stock Exchange. The Act also requires that the rules of the Stock Exchange make provisions for exclusion of membership of persons who are not of good character and of high business integrity. It is now provided by the Articles and Memorandum of Association of the Stock Exchange that its membership should not exceed 200 at any one time.

It is also a provision in the Act (section 7) that where any amendment is to be made to the rules of the Stock Exchange notice thereof shall be given to the Minister; and the Minister may within 21 days of the receipt of the notice give notice to the Stock Exchange that he disallows the whole or any part of the amendments in question and whereupon all such whole or specified part will have no force or effect.

Another controlling provision of the Act (sec. 9) is that no person shall carry on the business of dealing in securities unless he also holds a dealer's licence under the Act.

According to article 6 of the Articles and Memorandum of Association of the Kuala Lumpur Stock Exchange an applicant for membership of the exchange must have a number of qualifications among which are that he must be at least 21 years old and a citizen of this country and he must also be a person of good character and of high business integrity. Article 27 provides for suspension, expulsion and other disciplinary action against a member and the penalty liable to be imposed on a member includes a fine and if the fine is not paid he is liable to 14 days' suspension and if the fine is still unpaid after 7 days thereafter, he is then liable to expulsion summarily by notice in writing. According to the rules relating to member firms and member companies every member shall undertake to observe the rules in consideration for approval of trading on the Exchange and the use of the Exchange's trading facilities. To this end it is also provided that every member shall before being recognised as a member sign an undertaking in the form as set out in appendix I to the Rules. According to the form of undertaking the member undertakes and agrees "to be bound in all respects by and to comply with the rules" for trading by member firms and member companies "which now are or may hereafter be in force."

A useful local case dealing with the same preliminary point not referred to by either counsel is the case of *In re Application by Loke Wan Tho*[1] where the court was also asked whether an order of certiorari would lie to the City Council of Singapore. Whyatt C.J. gave some useful guidelines at page 150:–

> "The writ of certiorari, (as an order of certiorari used, until recently, to be called) is a very old and high prerogative writ which has its roots deep in the genius of our common law. It is principally concerned with public order in the sense that its main purpose is to enable the High Court to control the action of inferior tribunals which exceed their jurisdiction; it has also an incidental or secondary purpose in that it provides a speedy remedy to a person aggrieved by a clear excess of jurisdiction by an inferior tribunal. But it is not designed nor can it properly be used to determine issues between parties. In the course of time, certain principles have been laid down by Judges of high authority and perhaps the most important for the present purpose is that certiorari will not lie to bodies other than courts *stricto sensu*, unless their jurisdiction is regulated by analogy to judicial rules. According to the lucid and penetrating dictum of Lord Radcliffe in *Nakkuda Ali* v. *Jayaratne:*[2]
>
> 'The only relevant criterion by English law is ... the nature of the process by which ... they are empowered to arrive at their decision. When it is a judicial process or a process analogous to the judicial certiorari can be granted.'"

The real crux of the problem is in my opinion there is no dichotomy between judicial acts and administrative acts. Widgery C.J. when he first dealt with *R.* v. *Board of Visitors of Hull Prison*[3] made a pertinent comment on the exercise of discretion of the court in drawing the limits in the application of certiorari. He said at page 688:–

"One must start this question of whether certiorari will or will not go with a recognition of the fact that there is not, and one may hope never will be, a precise and detailed definition of the exact sort of order which can be subject to certiorari. If we ever get to the day when one turns up a book to see what the limit of the rights of certiorari is it will mean that the right has become rigid, and that would be a great pity. Therefore, we approach it today, in my judgment, on the basis that there are no firm boundaries, and one has to look to such clear and useful, helpful pointers as, with the assistance of counsel, we have been able to derive from the authorities."

It has by now been firmly established that certiorari may issue in those circumstances as indicated in the well known judgment of Atkin L.J. in *R.* v. *Electricity Commissioners*[4] where at page 205 he said:

"Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

The modern approach to certiorari is of course to be found in *Ridge* v. *Baldwin*[5]. Thus certiorari may today issue not only against inferior courts, tribunals, local authorities, and other statutory bodies, individual officers discharging public functions but generally speaking also against bodies which discharge functions of a public nature affecting individual interests even if such body is neither constituted by statute nor endowed with statutory jurisdiction, if it is required to act in a judicial manner. It seems settled, however, that, certiorari will not lie to a private body (statutory or otherwise) which derives its jurisdiction solely from contract. See also *de Smith* 4th Edn. pages 383, 384, 385 and 386.

A review of the numerous cases on this topic would reveal the following underlying philosopy. As Widgery C.J. said in 1974 certiorari should issue only in the clearest of cases and with the most serious considerations. The courts have however been flexible in their attitude in exercising jurisdiction. They may decline or extend their jurisdiction depending on several considerations including that of public policy as well as of the peculiar facts of each case. Thus certain acts of tribunals may be immune from review by certiorari for reasons of public policy notwithstanding that such acts are not purely ministerial or administrative. See *Halsbury* 4th Edn., vol. 1, p. 151. Certiorari will not lie to remove land assessments of land tax because to remove them would cause grave public inconvenience. Also certiorari will not lie against the act of an officer whose duty it is to act in matters of discipline if by so doing the court would be interfering with the free and proper exercise of the disciplinary powers conferred on the officer. Thus in *R.* v. *Metropolitan Police Commissioner Ex parte Parker*[6] where the exercise of the power of the Commissioner to revoke the licence of a cab driver was considered purely administrative and not an exercise of a judicial or quasi judicial function. Whereas in *R.* v. *Barnsley Council*[7] the Court of Appeal held that the decision to revoke Mr. Harry Hook's licence to a market stall because the officer considered Harry Hooks' conduct reprehensible was open to review because there was a common law right involved and the licence was not determinable at will. In *R.* v. *Hull Visitors, Ex parte St. Germain*[8] the Court of Appeal disagreed with Widgery C.J. and held that although the board of visitors had many other administrative functions but when adjudicating against discipline under the rules they were performing a judicial act and therefore subject to judicial review by way of certiorari.

In *R.* v. *Criminal Injuries Compensation Board*[9] the Court found that the compensation board although not constituted by law was set up by the executive after debate in Parliament and that the money paid to satisfy the awards was drawn from funds provided by Parliament. Based on these considerations the court concluded that because the existence and functions of the Board were at least recognised by Parliament this produced twofold consequences, namely (1) it negatived any notion that the board was a private tribunal and (2) it conferred on the board what was called a public or official character, and that became the basis in holding that certiorari could issue against the board.

Applying the principles derived from the authorities, is the Kuala Lumpur Exchange then a body in respect of which an order of certiorari may issue. In my opinion it is not. I have come to this conclusion on the following grounds:–

(1) Although there are many provisions in the Securities Industry Act 1973 which control or regulate the affairs of the Kuala Lumpur

Stock Exchange in many ways this fact by itself alone cannot make the acts of the Stock Exchange Committee in relation to the members of the Stock Exchange subject to review by certiorari. As the preamble to the Act clearly indicates, the objects of the Act was to make provisions in respect of the stock markets, stock exchanges and stock brokers and persons dealing in securities. It is not uncommon for Parliament in modern times to embark on extensive regulatory measures to control and regulate the activities of private bodies and business organisations for the general protection of the public. There have been numerous statutes passed by Parliament with the avowed object of controlling the activities of corporations, societies, clubs and business agencies. Despite these controls these bodies remain essentially private bodies. Statutory controls alone, however stringent they may be, do not convert private bodies into public bodies performing public functions.

(2) It is clear that the objects of the Kuala Lumpur Stock Exchange are commercial in nature. It is also clear that the relationship between the Stock Exchange and the applicant and other members is strictly contractual. To emphasise the contractual relationship the rules relating to member firms and member companies of the Kuala Lumpur Stock Exchange prescribe that before being recognised as a member by the Exchange a member shall sign an undertaking as set out in Appendix I to the Rules. In the undertaking it is expressed in no uncertain terms that in consideration of being recognised by the Committee of the Kuala Lumpur Stock Exchange the undertaking is signed signifying that the member "agrees to be bound in all respects" by the rules. Having undertaken to be bound by the rules "in all respects" I do not think that the applicant can now be heard to say that they are not bound by the rules and seek the court's aid to quash a decision made under the rules.

(3) It has been urged on behalf of the applicant that the rights of the members of the Stock Exchange are at stake because suspension from business under the provisions of the disciplinary rules affects the livelihood of the members. That factor does not in my opinion, constitute a sufficient ground for a conclusion that the Committee's decision should be subject to review by certiorari. Surely it must be shown first that the law requires the Committee to arrive at its decision in a judicial manner. I see nothing in the provisions of the rules nor in the language used to warrant such a conclusion. There is no duty to act judicially here expressed or implied. The test for the availability of certiorari is in the nature of the body as well as in the nature of the process by which the body arrives at its decision.

(4) Looking at the rules relating to members of the Kuala Lumpur Stock Exchange I do not see either from the provisions nor the language used that the functions of the Stock Exchange of the Stock Exchange Committee in the conduct of the affairs of the members are in any way manifestly public in nature. Despite the stringent controls by legislation the Kuala Lumpur Stock Exchange remains in my opinion an exclusive business club and the members are governed by the rules of their club. The relationship between the Stock Exchange and its members is substantially if not wholly contractual in nature.

On the above grounds it is my conclusion that the Kuala Lumpur Stock Exchange is not a body in respect of which certiorari may issue.

From the above decision the applicant appealed to the Federal Court.

FEDERAL COURT.

Raja Abdul Aziz Addruse for the appellant.
Wong Chong Wah for the respondent.

Cur. Adv. Vult.

Abdoolcader J. (delivering Judgment of the Court):

PROEM: THE ISSUE AND BACKGROUND

How far can the long arm of certiorari reach? To whom can it extend? These are the central questions which radiate from and constitute the core of the sole issue on a preliminary point of law posed for resolution in this appeal as to the amenability of decisions of the Kuala Lumpur Stock Exchange Committee to orders and directions of this nature.

The appellant, an unlimited company incorporated under the Companies Act, 1965, carrying on the business of a stock broker as a member of the Kuala Lumpur Stock Exchange ('the Exchange') sought and obtained leave to apply for an order of

certiorari against the Committee of the Exchange which is conferred with authority and power to manage and regulate its affairs (under article 30 of its articles of association) in representative proceedings against the respondents ('the Committee') to quash the decision of the Committee made on April 21, 1979 imposing a fine of $5,000 on the appellant under article 27 of the articles of association of the Exchange for alleged breaches of rules 4(1) and (m) of the Rules of the Exchange consequent to the rejection by the Registrar of Companies as the licensing authority under the Securities Industry Act, 1973 ('the Act') of the application for a dealer's licence under the Act by one of the appellant's shareholders and directors by reason of which he ceased to be authorised to deal in securities with certain consequential results necessitating requisite ancillary action on the part of the appellant. The appellant complains that before arriving at its decision to impose the fine, the Committee did not apparently indicate to it that it had breached the rules in question or give it an opportunity to be heard, and it is further alleged that the Committee had erred in law in its construction of the effect and the purported application of these rules.

It is not necessary for present purposes to go into the circumstances culminating in the decision of the Committee sought to be impugned as this appeal only involves a juristic issue as to whether judicial review by way of certiorari is available against the Committee. At the hearing of the substantive motion for certiorari, it was agreed by counsel on both sides that a preliminary question of law should be decided in the first instance, scilicet, whether the Committee is a body against which certiorari will lie. Hashim Yeop A. Sani, J., after hearing argument and in a reserved judgment delivered on December 22, 1981 held it is not on the grounds that (a) the Exchange (and, it would follow, the Committee) is essentially a private body, (b) the relationship between the parties is strictly contractual in nature, (c) the Committee is not under any express or implied duty to act judicially when exercising disciplinary powers and (d) the functions of the Exchange are not in any way manifestly public in nature as it is no more than an exclusive business club.

It would perhaps be convenient and appropriate for the purposes of this appeal against that order to deal first with the principles of law arising for consideration and application in this case and then discuss the structure, nature, powers, duties, functions and synoptical standing of the Exchange in the light of the law to determine whether the Committee is subject to judicial review in the circumstances in the matter of the penalty imposed on the appellant. To avoid tautology, statutory references in this judgment are to the Act.

THE LAW

The starting point must necessarily be the locus classicus on this aspect of judicial review – *R.* v. *Electricity Commissioners, Ex parte London Electricity Joint Committee Co. (1920) Ltd.*[4] in which in a famous passage which has been repeatedly referred to and relied on since, Atkin, L.J., said (at page 205) that certiorari and prohibition would lie against 'any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act(ing) in excess of their legal authority'. There has been some confusion on the purpose and import of the words 'the duty to act judicially' which however has since been put right by a reinterpretation thereof by Lord Reid in *Ridge* v. *Baldwin*[5] (at pages 74 – 79) where he explained in effect that in the correct analysis this phrase was simply a corollary and the automatic consequence of the power 'to determine questions affecting the rights of subjects' and that where there is any such power there must be the duty to act judicially. Lord Hodson also in that case (at page 130) criticised the fallacy of saying that 'the giver of the decision is acting in an executive or administrative capacity as if that was the antithesis of a judicial capacity'. The House of Lords made it clear in that case that if a tribunal is able to affect rights, that in itself shows that the courts can supervise the tribunal through the prerogative orders and it is not necessary to employ terms such as quasi-judicial. Even as far back as 1952 the Divisional Court in England was able to say in *R.* v. *Manchester Legal Aid Committee, Ex parte R.A. Brand & Co. Ltd.*[11] (at pages 428 – 429):

> "The true view, as it seems to us, is that the duty to act judicially may arise in widely different circumstances which it would be impossible, and, indeed, inadvisable, to attempt to define exhaustively".

It need hardly be said that a person who, although he has authority to determine questions, owes that authority solely to a private contract is not exercising legal authority in a public law context. Private clubs and private arbitrators, for instance, are beyond the reach of certiorari and prohibition as their powers derive solely from contract. The limits to the

right of certiorari and prohibition have, however, yet to be exhaustively defined and this position is now highlighted by the decision of the English Court of Appeal in *Reg.* v. *Criminal Injuries Compensation Board, Ex parte Lain*[12] where it was held that certiorari would lie where the Compensation Board derived its authority not from statute but from an exercise of the royal prerogative. The basis for the grant of certiorari there lay in the nature of the functions performed by the Board. It was charged with the judicial determination of the question whether, and to what extent, compensation should be paid, that determination forming an essential precondition to the payment of compensation by the Crown. It was this feature of the Board's functions that made it amenable to certiorari. It would appear that the relevant enquiry was not so much as to the source of the respondent's power, but as to the character of that power, and that *ceteris paribus* certiorari would lie to any respondent who had powers of a public rather than a private or domestic nature. Lord Parker, C.J., said *inter alia* in that case (at page 882) that the exact limits of certiorari have never been and ought not to be specifically defined as they have varied from time to time being extended to meet changing conditions, and the only constant limits throughout were that the tribunal was performing a public duty.

In *Reg.* v. *Board of Visitors of Hull Prison, Ex parte St. Germain and Others*[3] which was however reversed by the Court of Appeal[13] on the substantive issue of whether disciplinary proceedings against prisoners were subject to judicial review, Lord Widgery, C.J., said in the Divisional Court (at page 688):

"One must start this question of whether certiorari will or will not go with a recognition of the fact that there is not, and one may hope never will be, a precise and detailed definition of the exact sort of order which can be subject to certiorari. If we ever get to the day one turns up a book to see what the limit of the rights of certiorari is it will mean that the right has become rigid, and that would be a great pity. Therefore, we approach it today, in my judgment, on the basis that there are no firm boundaries, and one has to look to such clear and useful, helpful pointers as, with the assistance of counsel, we have been able to derive from the authorities".

The undefined limits and the extension of the scope of the remedy of certiorari over recent years were reaffirmed by the Court of Appeal in that case (at page 448 per Megaw, L.J., pages 455 – 458 per Shaw, L.J., and pages 463 – 466 per Waller, L.J.).

A body statutorily vested with jurisdiction over persons who have entered into contractual relationships with it may be subject to prerogative orders though the occasion for the exercise of this jurisdiction may only accrue after the contractual relationship is entered into. *Ex parte Lain*[12] would appear to suppeditate the key to opening the doors for the extension of the prerogative orders to bodies owing their powers solely to contract provided their powers although contractual are infused with a public element, and there is also authority to the effect that a body legislatively recognised may be subject to such jurisdiction. In *Reg.* v. *Barnsley Metropolitan Borough Council, Ex parte Hook*[7] the English Court of Appeal quashed by certiorari the revocation of a licence involving both a contractual element and the common law right to trade in a market, and we would advert to the judgment of Scarman, L.J., (at page 1060) on the question of the element of public law present in that case and the fact that the contractual licence was available in accordance with the discretion conferred by a statute regulating the common law right. That case in holding that a body vested with jurisdiction over persons with whom it has entered into a contractual relationship is subject to certiorari went on to decide that in those circumstances in exercising the contractual right it was under a duty to act judicially. *Reg. (Doris)* v. *Ministry of Health & Local Government and the Northern Ireland Health Services Board*[14] decided that certiorari would lie to review decisions of the Dental Services Committee and of the Ministry's appeal committee notwithstanding that those bodies exercised a jurisdiction arising out of a contract between a practitioner and the Health Services Board. In *Reg.* v. *Wadley, Ex parte Burton*[15] where a turf club's functions were afforded legislative recognition, it was held (at page 295) that a domestic tribunal recognised by the legislature is subject to prohibition.

So much then for the law.

THE EXCHANGE

We now turn to consider the constitution, structure, purpose and functions of the Exchange.

The Exchange is a company limited by guarantee incorporated under the Companies Act and was formed by the consensus of its members. It was in existence prior to the Act which was enacted in 1973 but brought into force only on December 27, 1976. Its governing body is the Committee

under article 30 of its articles of association. When the Act became operative the Exchange was recognised by the Act and deemed by section 98(1) to be a stock exchange approved under Part III thereof with a requirement for it to provide in its rules to the satisfaction of the Minister [defined as the Minister responsible for the securities industry – section 98(2)] all matters specified in section 6(2)(b) within six months from the commencement of the Act. The Act introduced several provisions affecting and in effect regulating the affairs and functional operation of the Exchange.

Section 5 prohibits the establishment or maintenance of a stock market other than that of a stock exchange. Section 6 empowers the Minister to approve a body corporate as a stock exchange if he is satisfied with regard to the several matters specified in sub-section (2) thereof, and in particular under paragraph (b) of that sub-section that its rules make satisfactory provision for the matters enumerated therein and we would refer especially to sub-paragraphs (ii) for the expulsion, suspension or the disciplining of members and (vi) generally for the carrying on of the business of the stock exchange with due regard to the interests of the public, and paragraph (c) that the interests of the public will be served by the granting of his approval. It will be seen therefore that the public element by the injection of the Minister's dominant role and more especially regard for the public interest is specifically provided for in the establishment of a stock exchange, and by section 98(1) the Exchange itself is deemed to be a stock exchange approved under section 6 as from December 27, 1976 and accordingly recognised and regulated by the provisions of the Act. Section 7 requires the Minister to be notified of any amendment to the rules [as defined in section 2(1) to include *inter alia* the memorandum and articles of association] of a stock exchange with power for him to disallow the whole or any specified part of the amendment in question. Sections 9 and 10 provide. that no person shall carry on a business of dealing in securities or hold himself out as such unless he has a dealer's or a dealer's representative's licence and section 8 prescribes a grace period for penalties for non-compliance therewith after the implementation of the Act.

Section 52 provides for the right of the committee of a stock exchange to impose on its members further obligations or requirements not affected by the provisions of Part VII of the Act. Section 54 makes provision for certain moneys to be deposited by a stock broker with the stock exchange of which he is a member or by which his firm or company is recognised and we would refer in particular to sub-sections (1) and (5) thereof. Section 55 enacts that certain moneys are to be held by a stock exchange on trust and section 56 requires deposits to be invested by a stock exchange. Section 58 enjoins a stock exchange to establish and keep proper accounts of all deposits. Section 61 stipulates that a stock exchange shall establish and keep a fidelity fund constituted in terms of the provisions of section 62 and to be administered by its committee on its behalf. Sections 64 to 82 make ancillary provisions relating to the powers and duties of a stock exchange and its committee with regard to fidelity funds and we would refer in particular to the provisions of section 67 which make it a mandatory prerequisite for a contribution of not less than $1,000 to the fidelity of a stock exchange for membership of it or partnership in a member firm or directorship of a member company and also for a compulsory annual contribution thereto of not less than $500.

The objects for which the Exchange is established are specified in paragraph 3 of its memorandum of association and sub-paragraph (a)(i) thereof states its primary object is 'to provide, regulate and maintain facilities for conducting the business of a stock exchange in Malaysia'. Turning now to its articles of association, article 6 prescribes the qualifications for membership and refers primarily to a dealer in securities. Article 7 gives power to the Minister in connection with membership of non-citizens. Under article 10 only dealers can be members of the Exchange and they must be licensed under the Act as such. Article 27 provides for suspension, expulsion or other disciplinary action and we refer in particular to paragraphs (f), (h) and (i). Article 30 relates to management and the establishment of the Committee to manage and regulate the affairs of the Exchange and article 50 lays down the powers and duties of the Committee and specifically stipulates that these are subject to such rules and regulations, not being inconsistent with the articles or the provisions of the Act, as may be prescribed by the Exchange in general meeting. We then have the Rules of the Exchange relating to member firms and member companies and refer to rule 2 as to the mode of trading and rules 3 and 4 in respect of the requirements and conditions that must be complied with and observed by member firms and companies. Rule 2(2) provides for an undertaking by every member firm and member company to observe the rules in consideration for the privileges of trading on the Exchange and the use

of the Exchange's trading facilities as a prerequisite to recognition of its membership. Rule 2(1) is basically to the effect that a licensed dealer under the Act has to trade as a stock broker or dealer in securities as a member of a member firm or a member company. Rule 8 deals with suspension, withdrawal of recognition or other disciplinary action on the lines of article 27 of the articles of association of the Exchange but with some additional provisions and was made no doubt to satisfy the requirements of section 6(2)(b)(ii).

We should perhaps immediately touch on the matter of the undertaking given by the appellant to the Committee under rule 2(2) on April 7, 1977 in the prescribed form. Much had been made out of this undertaking and the learned Judge placed considerable reliance on it in holding that it emphasised the strictly contractual nature of the relationship between the Exchange and the appellant and other members. We do not think that any such conclusion is necessarily justified as wholly detracting from the public element in the conceptual scheme as the position would be no different even had there been no requirement for such an undertaking since the parties would be bound by the provisions of the articles of association and rules in any event. The undertaking 'to be bound in all respects by and to comply with the Rules' does not mean that the Exchange has *carte blanche* to act arbitrarily and outside the scope of its powers in dealing with its members when exercising its functions and duties which are legislatively directed and regulated and therefore of a public rather than a private nature. Total reliance on the undertaking in question *per se* would appear to involve the fallacy of *petitio principii* as it begs the question in issue in that the point for determination is whether the Exchange has legal authority to determine questions affecting the rights of stock brokers and is therefore under a duty to act judicially in the circumstances.

THE UPSHOT

In the light of the provisions of the Act and the constating and governing instruments we have referred to and on an application of the principles of law we have adumbrated, it would appear that the Exchange is a hybrid corporation – a company incorporated under the Companies Act but recognised and regulated by the Act and subject to its governance and authority with therefore an element of public flavour superimposed on the contractual element in relation to its members. It is a statutorily regulated entity under the overall direction and control of the Minister in fundamental respects, thus manifesting a distinctive public element which is reflected particularly in the requirements of the provisions of section 6(2)(b)(vi) and (c) which prescribe the public interest as the prime consideration. The exercise of disciplinary powers by the Exchange is conferred and prescribed by legislation under which the Minister is to approve the scope and type of such powers and the exercitation whereof would affect the livelihood of its members. Generally statutes regulating the several professions provide for a body to be established to exercise disciplinary powers over its members but under the Act the method of discipline is effected by delegating that power to a body not established by the Act itself but which must be approved by the Minister pursuant to and is controlled and subject to its provisions, and so it virtually comes to the same thing.

We should perhaps add, anent the learned Judge's assessment of its genre, that we cannot but express in the circumstances our view, pithily put perforce, that the Exchange is no more an exclusive business club than the Criminal Injuries Compensation Board [in *Ex parte Lain*[12] which has been repeatedly applied since] can be said to be merely a welfare benefit society. The Board in that case contended that it had no real authority as its decisions only gave people a better but unenforceable chance of receiving charity from the Crown, but the court said that this did not detract from its authority.

The Committee which is responsible for the management of the affairs of the Exchange is accordingly a body of persons having legal authority to determine the rights of persons licensed under the Act to carry on business as stock brokers and it follows that in purporting to exercise its disciplinary functions it necessarily has the duty to act judicially in the adhibition of that power and it is therefore subject to judicial review by way of certiorari and prohibition.

THE RESULT

In the premises we allowed this appeal with costs at the conclusion of argument, set aside the order of the learned Judge and remitted this matter to the High Court for the continued hearing of the substantive motion for certiorari on its merits and ordered the deposit lodged in court by way of security to be paid out to the appellant.

Appeal allowed.

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